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Supreme Court of the United States

October Term, 1973

No. 73 - 716

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

ROY D. GARNER,

Defendant/Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. .....

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

ROY D. GARNER,

Defendant/Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This is a petition of ROY D. GARNER for a writ of certiorari to review the order made by the United States Court of Appeals for the Ninth Circuit on July 6, 1973 affirming the order revoking petitioner's bond on appeal entered by the United States District Court for the Central District of California on March 15, 1972, and to review the order of the appellate court entered on August 31, 1973 denying petitioner's petition for rehearing and suggestion for rehearing en banc.

OPINIONS BELOW

The order of the District Court revoking petitioner's bond on appeal has not been published in any official reports. A copy of that order is attached hereto as Appendix A. The memorandum opinion of the Court of Appeals for the Ninth Circuit, filed on July 6, 1973 and as yet unpublished, as well as the order of the Court of Appeals denying petitioner's petition for rehearing and suggestion for rehearing en banc are attached hereto as Appendix B and Appendix C, respectively.

JURISDICTION

1. On August 8, 1970, petitioner was convicted of conspiring to violate federal gambling statutes. He appealed to the United States Court of Appeals for the Ninth Circuit and, pending appeal, was released on bond.

2. On February 25, 1972, the United States Attorney's office filed with the United States District Court a motion to revoke bond on appeal. The basis for the government's request for revocation of bond was that government agents had seized, from Garner's luggage, at the airport in New York, paraphernalia relating to horse races, some of which could be used to "fix" horse races; and that by virtue thereof, Garner was a "danger" to the community.

A hearing was held and, as a result thereof, on March 15, 1972, the District Court ordered that petitioner's bond be revoked. The order was stayed until April 24, 1972, so that petitioner could apply to the Court of Appeals for relief.

3. On April 17, 1972, petitioner applied to the District Court for reconsideration of its order revoking bond, for a stay of the order, and for the return of property seized by the Federal Bureau of Investigation and introduced into evidence at the hearing. These motions were denied, and petitioner filed a timely notice of appeal.

4. On April 24, 1972, a justice of the Court of Appeals, upon application by petitioner, issued an order staying the order of the District Court which revoked petitioner's bond.

5. On July 6, 1973, the Court of Appeals affirmed the order of the District Court revoking petitioner's bond.

6. On August 31, 1973, the panel denied petitioner's petition for rehearing and suggestion for rehearing en banc.

7. On September 28, 1973, the Court of Appeals for the Ninth Circuit granted petitioner's application for stay of mandate pending filing of this petition for writ of certiorari.

8. On September 30, 1973, Mr. Justice Douglas extended the time for filing this petition for writ of certiorari to and including October 30, 1973.

9. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. **Whether the search of petitioner's luggage by airline employees constituted a federal search subject to Fourth Amendment standards of reasonableness?**

II. **Whether government agents who have been advised by airline employees that luggage tendered for shipment contains suspicious articles must, consistent with the Fourth Amendment to the United States Constitution, obtain a search warrant before conducting their own search and seizing the articles?**

III. **Whether an appellate court may validate a search and seizure upon a novel theory not advanced or argued by the government or supported by the evidence, and does the adoption of such a new theory of justification for the seizure constitute a denial of due process of law as guaranteed by the Fifth Amendment to the United States Constitution?**

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant and constitutional statutory provisions are set forth in Appendix D; they are the Fourth and Fifth Amendments to the United States Constitution.

STATEMENT OF FACTS

On August 8, 1970, petitioner, ROY D. GARNER, was convicted of conspiring to violate federal gambling statutes and admitted to bail pending appeal. While the appeal was pending, the United States moved, with supporting affidavits, to revoke the bond on appeal and remand GARNER to the custody of the Attorney General.

A hearing was held on the government's motion, and,

concurrently, petitioner moved to strike the government's supporting affidavits and to suppress the evidence which gave rise to the government's motion. The facts developed at that hearing may be summarized as follows:

Petitioner, using the name "Mr. Green," was attempting to board a flight from New York City to San Francisco when he was stopped for questioning by a sky marshal. He was asked a series of questions, to which he responded, and he permitted a search of his handbag, but when asked to produce identification, he refused and left the boarding area, saying, "I don't want to fly anyway."

The pilot of the plane was notified, and he ordered that all passengers and luggage be removed from the aircraft and then be reboarded. Every passenger and every piece of luggage on board the plane was then unloaded, after which the passengers claimed their luggage and were permitted to reboard the flight. However, four pieces of luggage were left in the baggage area, unclaimed.

Airline personnel subsequently took the bags to the Baggage Service Office and opened them in an attempt to ascertain the identity of their owner and to search for any dangerous instrumentalities like weapons or explosives. Inside the bags they found hypodermic needles, sealed bottles of unknown substances, and photographs of horses. They also found a prescription bottle with the name of Roy Garner.

F.B.I. Agent Joseph Fanning was summoned to the airport, and Fanning conducted a thorough search of the contents of the luggage and concluded that "something wasn't right." He then telephoned the United States Attorney's office in the Eastern District of New York for

instructions. The Chief United States Attorney in charge of the Criminal Division, upon being advised of the contents of the bags, instructed Agent Fanning to seize everything. Fanning, however, departed from the airport, leaving the luggage in the custody of United Air Lines' personnel and under lock and key.

No one attempted to claim the bags, and on the following afternoon Agent Fanning returned to seize the luggage and its contents. He did not possess a warrant for the seizure but was, instead, relying upon the verbal authorization of the United States Attorney.

The luggage was taken to the F.B.I. office and inventoried by Agent Fanning. Many, but not all, of the items found by the agent were introduced into evidence at the hearing on the motion to revoke petitioner's bond on appeal.

At the hearing it was stipulated that several items contained in the luggage could be used to "fix" horse races by injecting stimulants or depressants into the bloodstream of horses.

REASONS FOR GRANTING THE WRIT

Petitioner requests that this Court review the decision of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court, Central District of California, inasmuch as the Circuit Court has failed to apply the doctrine of *stare decisis* and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Specifically, the panel failed to apply the doctrine announced by the Ninth Circuit in its en banc ruling

in *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966), and *United States v. Davis*, ... F.2d ..... (9th Cir. 1973) (decided June 29, 1972 - No. 71-2993).

ARGUMENT

I

The Failure Of The F.B.I. Agent To Secure A Warrant Prior To Seizing The Luggage Rendered The Seizure Unlawful Under The Fourth Amendment And *Corngold v. United States.*

Initially, it should be observed that petitioner resisted the government's motion for revocation of his appeal bond by moving to suppress and for return of the luggage and the contents thereof, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure.

It is elementary " . . . that the police must, whenever practical, obtain advance judicial approval of searches and seizures through the warrant procedure . . . " (*Terry v. Ohio*, 392 U.S. 1 (1968)). Moreover, it is clear that only in a "few specifically established and well delineated" situations can a warrantless search be justified (*Vale v. Louisiana*, 399 U.S. 30, 35 (1970)). In the instant case, no warrant was obtained. Certainly, under the circumstances, time would have existed for such a procedure, and, thus, it would seem to be constitutionally mandated (see, *Camara v. Municipal Court*, 387 U.S. 523 (1967); *Katz v. United States*, 389 U.S. 347 (1967)). Also, there is no evidence of consent (see, *Zap v. United States*, 328 U.S. 624 (1964); *Shapiro v. Thompson*, 394 U.S. 618 (1969)). Similarly, the other justifications

for search were not present, such as being incident to arrest, in hot pursuit, or pursuant to danger of imminent destruction (see, *Chimel v. California*, 395 U.S. 752 (1969); *Warden v. Hayden*, 387 U.S. 294 (1967); *Schmerber v. California*, 384 U.S. 757 (1966); *Coolidge v. New Hampshire*, 401 U.S. 443 (1971)).

In *Corngold v. United States*, *supra*, the Ninth Circuit, sitting en banc, made a definitive statement on the application of the Fourth Amendment to searches and seizures performed by airline employees who are acting in conjunction with agents of the federal government. In *Corngold*, federal agents, suspecting that packages due to be shipped by air freight contained watches, approached an airline employee and requested that he open the packages for their inspection. The agents not only helped to open the packages, which were securely bound, but they also pulled out the small inner boxes to examine their contents. The packages were then closed and shipped to their destination. The Ninth Circuit invalidated this search because the federal agents "had a hand" in it (*Lustig v. United States*, 338 U.S. 74 (1949)).

Here, as in *Corngold*:

> " . . . The officers had no warrant, and there were no circumstances which might have justified a search without one. No arrest was made to which a search without a warrant might be incident. The government made no showing that the packages might be removed before a warrant could be obtained. Appellant was not threatening to remove them, nor was the airline, except under such conditions as the officers saw fit to impose. From the time appellant left the

> packages with the carrier in Los Angeles they were subject to the effective control of the customs agents. There was nothing to prevent the agents from securing a warrant on a proper showing, either before the packages were shipped from Los Angeles or after they arrived in New York. On this record, search without a warrant was not justified even if the customs agents had probable cause to believe the packages contained contraband."
>
> *Corngold v. United States, supra,*
> 367 F.2d at 3.

The Court of Appeals has distinguished the present case from *Corngold* on the ground that the initial search was a *private* one carried out by an airline employee acting upon his own rather than at the behest of a federal agent and that, therefore, the Fourth Amendment standard of reasonableness does not apply.

However, on June 29, 1973, one week before the filing of the opinion in the instant case, the Ninth Circuit Court of Appeals stated unequivocally that the government of the United States has been sufficiently implicated in airport searches to require that they be conducted in compliance with the Fourth Amendment. *United States v. Davis, supra* (9th Cir. No. 71-2993).

> "The government's role in the airport search program is and has been a dominant one. But even if the government's involvement at some point in the period could be characterized accurately as mere 'encouragement,' or as 'peripheral, or . . . one of several

> cooperative forces leading to the [alleged] constitutional violation,' see *United States v. Guest*, 383 U.S. 745, 755-56 (1966), that involvement would nevertheless be 'significant' for purposes of the Fourth Amendment. Constitutional limitations on governmental action would be severely undercut if the government were allowed to actively encourage conduct by 'private' persons or entities that is prohibited to the government itself.
>
> "It makes no difference that the act of opening appellant's briefcase was accomplished by a 'private' airline employee rather than a 'public' official. The search was part of the over-all, nationwide anti-hijacking effort, and constituted 'state action' for purposes of the Fourth Amendment."
>
> *United States v. Davis, supra,*
> slip opinion page 15.

In characterizing the search of petitioner's baggage as a "private" search, the Court of Appeals relied upon *Gold v. United States*, 378 F.2d 588 (9th Cir. 1967). In *Davis*, however, the court seriously questioned the continuing vitality of *Gold*.

> "The major governmental effort to meet the threat of hijacking began in late 1968, when hijacking of commercial aircraft reached serious proportions, and intensified steadily thereafter.
>
> "Various techniques for the surveillance and search of potential air passengers have been a part of that effort. At no time since late 1968

> could activities of this kind at the nation's airports have been described accurately as 'an independent investigation by the carrier for its own purposes,' *Gold v. United States*, 378 F.2d 588, 591 (9th Cir. 1967), and thus beyond the reach of the Fourth Amendment. The United States has 'significantly involved itself' in airport searches from the beginning *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967)."
>
> *United States v. Davis, supra,*
> slip opinion page 4.

In the *Davis* case, the Ninth Circuit Court of Appeals held that the appropriate standards for evaluating airport searches under the Fourth Amendment should be the same standards applied to "administrative" searches. (See, *United States v. Biswell*, 406 U.S. 311 (1972); *Wyman v. James*, 400 U.S. 309 (1971); *Camara v. Municipal Court, supra; See v. City of Seattle*, 387 U.S. 541 (1967).)

> "To meet the test of reasonableness, an administrative screening search must be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it. It follows that airport screening searches are valid only if they recognize the right of a person to avoid search by electing not to board the aircraft."
>
> *United States v. Davis, supra,*
> slip opinion page 25.
>
> "Since a compelled search of persons who elect not to board would not contribute to barring weapons and explosives from the plane,

> it could serve only the purpose of apprehending violators of either the criminal prohibition against attempting to board an aircraft while carrying a concealed weapon, 49 U.S.C. § 1472(1), or some other criminal statute. Such searches would be criminal investigations subject to the warrant and probable cause requirements of the Fourth Amendment."
>
> *United States v. Davis, supra*, slip opinion page 27.

Petitioner contends that the search of his baggage was plainly a governmental one. The search was precipitated only after MR. GARNER had (1) met the hijacker's "profile"; (2) activated the magnetometer; (3) submitted to a search of his handbag; (4) answered a series of questions posed by a United States sky marshal; and (5) failing to produce satisfactory identification, had elected not to board the flight.

In characterizing this search as a "private" one, it is submitted that the Court of Appeals has failed to apply the doctrine of *stare decisis* and, therefore, the case is properly reviewable by this Honorable Court.

II

There Is An Apparent Conflict Among The Circuit Courts Of Appeals In Rulings Governing The Applicability Of The Fourth Amendment To "Aircraft Searches"—A Conflict Which Can Only Be Resolved By This Honorable Court

In *United States v. Burton*, 475 F.2d 469 (8th Cir. 1973),

an airline ticket agent became suspicious of a defendant who had met the "hijacker's profile." The employee obtained a skeleton key, opened the defendant's bag, and discovered a loaded pistol

The Court of Appeals for the Eighth Circuit determined that this was not a governmental search but, instead, characterized it as a private one, relying upon *Gold v. United States, supra.* The ruling in *Burton* openly conflicts with the holding of *Davis, supra,* and the conflict ought to be resolved by this Court.

The Court of Appeals for the Second Circuit, while not characterizing anti-skyjacking procedures as administrative searches subject to the Fourth Amendment's requirement of reasonableness, has declared that the opening of a passenger's bag is justifiable only in "compelling circumstances," or after voluntary consent after the passenger has been made aware of his right to prevent the search by relinquishing the opportunity to board the aircraft. (See, *United Sates v. Clark,* 475 F.2d 240, 247 (2nd Cir. 1973).[1])

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[1]It is noteworthy, however, that Chief Judge Friendly of the Court of Appeals for the Second Circuit has voiced the opinion that any search of prospective airline passengers is reasonable so long as the search is conducted in good faith for the purpose of preventing hijacking and that citizens may avoid such searches by choosing not to travel by air. (See, *United States v. Bell,* 464 F.2d 667, 675 (2nd Cir. 1972) (Friendly, Chief Judge concurring).)

III

The Court Of Appeals Has Justified The Seizure Of Petitioner's Baggage Upon A Ground Which Was Neither Urged By The Government Nor Supported By The Evidence

The Court of Appeals has justified Agent Fanning's warrantless seizure of petitioner's bags on the ground that an emergency situation prevailed which threatened the destruction of contraband. (Appendix p. 9) There are two flaws in this reasoning: (1) Agent Fanning did not recognize the contents of MR. GARNER's baggage as "seizable contraband" upon discovery, and the record is devoid of any such subjective belief on his part; instead, according to his own testimony, after seeing the needles, the vials, the radio equipment, the notebook, the index cards and photographs, "I just put the whole thing together in my mind and I believed that something wasn't right here."(2) There is nothing in the record to indicate that Agent Fanning was concerned with the possibility that the suitcases would "disappear" or somehow be moved and their contents "lost"; on the contrary, the record reflects that he was simply suspicious of petitioner's baggage, that he connected it with the possibility of fixed races at Aqueduct, and that he contacted the United States Attorney in New York for instructions. Clearly, if Agent Fanning had believed that the bags contained contraband subject to imminent destruction, he would not have taken the trouble to consult with the United States Attorney, nor would he have left the baggage overnight at the airline. Nor is there any evidence in the record that the airline was prepared to

release the baggage to its claimant or forward the same to Chicago without first consulting the F.B.I. In short, the notion that there was an "emergency" justifying the seizure is a novel theory which originated with the Court itself.

The Supreme Court of California recently addressed itself to a somewhat similar question in *People v. Superior Court*, 7 Cal. 3d 186 (1972). There, the prosecutor attempted to justify a search and seizure on a theory not urged in the trial court but presented for the first time on appeal. The Court replied:

> "The purpose of the exclusionary rule—to deter unreasonable searches and seizures by law enforcement officers—would clearly be frustrated if the courts were required to uphold a search conducted on unreasonable grounds simply because the prosecuting authorities belatedly managed to devise an alternative theory on which the arresting officer *could* have acted reasonably if he had known of it. Compliance with the fundamental guarantees of the Fourth Amendment is not a game to be won by inventive counsel, but a practical, day to day responsibility of law enforcement personnel. Accordingly, just as a warrantless arrest or search cannot be justified by facts of which the officer was wholly unaware at the time [citations omitted] so also it cannot be justified on theories thereafter invented for the consumption of reviewing courts."
>
> *Id.*, at page 198.

> "To permit the People to inject this new theory into the case would deprive the petitioner of a fair opportunity to present an adequate record in response. The petitioner was entitled to assume that the justification for the search was presented before the magistrate. He had no opportunity to mount a legal attack on the theory advanced for the first time before this Court, nor to present evidence on cross-examination to rebut the factual basis underlying the additional justification for the search [citations omitted]."
>
> *Reinert v. Superior Court*, 2 Cal. App. 3d 36 (1969), at page 42, cited with approval in *People v. Superior Court, supra.*

This Court has recently characterized "exigent circumstances" as situations in which police action literally must be "now or never" to preserve the evidence of the crime (*Roaden v. Kentucky*, ... U.S. ....., 93 S. Ct. 2796, 2802 (1973).) Surely, there is nothing in this case to suggest that the opportunity to seize the contents of the luggage was fleeting or that this was a circumstance in which it was not practicable to secure a warrant. (See, *Coolidge v. New Hampshire, supra; United States v. Jeffers*, 342 U.S. 48, 52 (1951); *United States v. Colbert*, 454 F.2d 801, 804 (5th Cir. 1972).

CONCLUSION

The instant case raises an important federal question concerning the applicability of the Fourth Amendment to "airport searches," which question has not heretofore been considered by this Court. In view of the conflicting rulings

among the Circuit Courts of Appeals and in the Ninth Circuit itself, petitioner respectfully submits that this petition for writ of certiorari should be granted and that the issues herein presented be given plenary consideration by this Honorable Court.

Respectfully submitted,

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APPENDIX A

ORDER REVOKING BOND ON APPEAL AND REMANDING TO CUSTODY FOR SERVICE OF SENTENCE

In the United States District Court, Central District of California.

NO. 5356-(WF)-C.D. (C. A. No. 71-1219)

UNITED STATES OF AMERICA, Plaintiff, v. ROY D. GARNER, Defendant.

[Filed March 15, 1972]

The United States having appeared through its counsel of record, the defendant ROY D. GARNER having appeared through his counsel of record, a hearing having been held in which both testimony and physical exhibits were introduced, this Court having heard said testimony and examined said exhibits, it appearing that the defendant ROY D. GARNER has continued to participate in criminal activities after his conviction in this court by a jury, and good cause appearing therefor;

IT IS HEREBY ORDERED that the bond on appeal of the defendant ROY D. GARNER heretofore set in the amount of $10,000.00 personal surety by this court, is hereby revoked and the defendant ROY D. GARNER is forthwith remanded to the custody of the Attorney General of the United States to commence service of the sentence heretofore pronounced by this Court.

IT IS FURTHER ORDERED that the revocation of bond and remand to custody of the defendant ROY D. GARNER be stayed for twenty-one days until April 24, 1972 at 10:00

A.M. within which time the defendant may apply to the United States Court of Appeals for the Ninth Circuit for relief from this Court's order.

IT IS FURTHER ORDERED that a bench warrant be issued for the arrest of the defendant ROY D GARNER with no bail, but that execution of said bench warrant shall be stayed until April 24, 1972 at 10:00 A.M.

DATED: This 15 day of March, 1972.

WARREN J. FERGUSON
United States District Judge

†

APPENDIX B

MEMORANDUM OPINION OF THE COURT OF APPEALS

In the United States Court of Appeals, for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROY D. GARNER, Defendant-Appellant

No. 72-1823.

[Filed July 6, 1973]

Appeal from the United States District Court for the Central District of California.

Before: HAMLEY and MERRILL, Circuit Judges, and

SCHNACKE, District Judge*

The search and seizure question presented in this appeal arises in unusual circumstances. On August 8, 1970, Roy D. Garner was convicted of conspiring to violate federal gambling statutes. He appealed to this court and, pending appeal, was released on a ten thousand dollar personal surety bond with permission to leave the state of California. While the appeal was pending the United States moved, with supporting affidavits, to revoke the bond on appeal and immediately remand Garner to the custody of the Attorney General. The motion was made on the ground that, on December 16, 1971, while on bail pending appeal, Garner checked baggage with United Air Lines in New York City, for transportation to San Francisco, which was found to contain paraphernalia used to stimulate and depress race horses. According to the Government this indicated that Garner posed a serious threat to the community within the meaning of 18 U.S.C. § 3148.

Garner countered with a motion to strike from the Government's supporting affidavits all statements concerning the luggage and their contents, or, in the alternative, to suppress such evidence and return the property on the ground that the property was seized in violation of Garner's rights under the Fourth Amendment. A hearing was held, at which the motions to strike and to suppress were denied and the contents of the luggage were received as exhibits. On the following day, March 15, 1972, the district court entered an order revoking Garner's bail bond, remanding

*The Honorable Robert H. Schnacke, United States District Judge for the Northern District of California, sitting by designation.

him to custody, but staying revocation of the bond until April 24, 1972, to enable Garner to apply to this court for relief from the order. On April 3, 1972, the district court entered an ex parte order releasing most of the exhibits to the Federal Bureau of Investigation (F.B.I.) in the Southern District of New York for that agency's use in conducting investigations in that district.

On April 5, 1972, Garner moved in the district court for an order vacating the order revoking Garner's appeal bond. On April 13, 1972, Garner moved for an order setting aside the ex parte order of April 3, 1972. Alternatively, he moved for release of all the property to Garner or his attorney. On April 18, 1972, the district court entered an order denying all of Garner's pending motions. Garner appealed from this order on April 24, 1972.[1]

The facts pertaining to the search and seizure here in question are not in dispute. On December 18, 1971, a person identifying himself as "Mr. Green" bought a ticket in New York City for a flight to San Francisco on that day, on United Air Lines flight number 23. A United Air Lines employee later telephoned Deputy United States Marshal Victor O'Boyski, Jr., who was assigned to the anti-air-piracy

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[1]On April 20, 1972, Garner petitioned this court for a writ of mandate directing the district court to revoke its order revoking bail. *Garner v. Ferguson, et al.*, No. 72-1700. In that proceeding a judge of this court granted a temporary stay of that district court order on April 24, 1972. On May 12, 1972, a two-judge panel of this court denied respondents' motion to retract the stay and ordered the stay continued in full force and effect. Garner's petition for a writ of mandate had not been finally decided by this court. This opinion concerns only his direct appeal from the decision of the district court denying his motion for reconsideration of the district court's bail revocation order.

With regard to the substantive issue, conspiracy, a panel of this court, in an unreported decision, reversed Garner's conviction on June 5, 1972. *Garner v. United States*, No. 71-1219. Thereafter, the full court granted a rehearing in banc which is still pending. The search and seizure question now before us is not involved in the appeal from the conviction.

detail at John F. Kennedy International Airport, and said that they had a "Code 1" on their flight number 23 to San Francisco. This meant that they had a prospective passenger ("selectee") who had met the hijacker's "profile" boarding that flight.

O'Boyski proceeded at once to the United Air Lines terminal where he was informed that the selectee's name was "Mr. Green." After the flight was half boarded, "Mr. Green" entered the boarding area, and was detained by O'Boyski. "Mr. Green" walked through a magnetometer which registered "a little bit," but not enough to arouse O'Boyski's suspicions. "Mr. Green" was asked to open his hand bag and did so.

The deputy then asked "Mr. Green" a series of questions and requested that he identify himself. "Mr. Green" started to go through his wallet and then asked "Why?" He was informed that there was an F.A.A. regulation that he had to have identification to match his ticket. At this point "Mr. Green" snapped his wallet closed, put it back in his pocket, and said "No." O'Boyski then explained that if "Mr. Green" refused to show O'Boyski identification, it would be necessary to deny him clearance for the flight. "Mr. Green" then said, "I don't want to fly anyway." He turned around, picked up his hand bag and walked away from the gate.

O'Boyski observed "Mr. Green" stop at the ticket counter where he conversed with an individual later identified as Gerald Wofford. This latter individual then walked to the boarding area and was cleared for boarding. After clearing the remainder of the passengers, O'Boyski ascertained at the ticket counter that "Mr. Green" had cashed

in his ticket but had stated that he had no luggage, even though the employee at the counter had seen him check some through.

Agents of the airline then informed Michael James Harte, United Air Lines Supervisor of Passenger Service, of the events described above. Harte, in turn, informed the captain of flight number 23. The captain ordered that all passengers and all luggage be removed from the aircraft and then be reboarded. Every passenger and every piece of luggage on board flight number 23 was then unloaded. The passengers claimed their luggage and were permitted to reboard the flight.

It was then discovered that four pieces of luggage were left in the baggage area, unclaimed. These bags were taken to the Passenger Service Office near the ticket counter. Deputy O'Boyski observed this procedure but did not participate in any way. He then turned the entire matter over to the airline personnel and left the United Air Lines area. The four pieces of luggage were not searched by O'Boyski or any other federal officers, nor were they searched in their presence.

The airline officials waited for ten to fifteen minutes and the four pieces of luggage were not claimed by anyone. Airline personnel then took the bags to the Baggage Service Office, this being the normal procedure for unclaimed luggage. The bags were taken there to hold them for passenger claims, and to try to identify the baggage, or establish the ownership of the baggage.

There was no identification on the outside of the bags Mr. Harte and a companion then took out a box of keys and found one that would open the bags. They opened the

bags to determine the ownership of the luggage and to determine whether there were any dangerous instrumentalities inside. They found, inside the bags, hypodermic needles, sealed bottles of unknown substances, and photographs of horses. They also found a prescription bottle with the name Roy Garner.

Upon seeing this paraphernalia, and feeling that something was not quite right, Mr. Harte telephoned the F.B.I. Agent Joseph Fanning was instructed by the F.B.I. to proceed to the airport. There he met Harte, who informed him of the boarding incident and described the contents of the suitcases. Fanning requested that the suitcases be opened again and Harte did so.[2] Fanning saw the paraphernalia and telephoned to the Chief of the Criminal Division of the United States Attorney's office in the Eastern District of New York. Fanning was instructed by that office to seize everything.

Fanning then left the airport, leaving the luggage there under lock and key, with United Air Lines, for possible claiming. The bags were not claimed by anyone. Fanning returned to the airport the following day and, with the permission of airline personnel, seized the luggage. He took the bags to the F.B.I. office where the contents were inventoried. It was stipulated that many of the items found in the suitcases could be used to "fix" horse races by injecting stimulants or depressants into the bloodstream of horses or by cutting off their oxygen supply. Chemical analysis revealed the liquids found in the luggage to be Phenylbutazone, a drug used to relieve pain or reduce inflammation, Carphenasine, a

[2]In addition to the paraphernalia described above, the suitcases contained notebooks and a card index.

tranquilizer, and amphetamines, a central nervous system stimulant.

Garner does not appear to argue that the initial search by airline personnel was of a kind which rendered the subsequent government search and seizure unlawful. Nor, under the described circumstances, would there be any merit to such an argument. The initial search of Garner's luggage was accomplished by private individuals, concerning which search no federal agents had a part. The Fourth Amendment proscribes governmental, rather than private, action, and therefore this initial search was not illegal. *United States v. Harless*, 464 F.2d 953, 957 (9th Cir. 1972).

Garner does contend that the information conveyed to the F.B.I. agent by airline personnel following the latter's private search of the luggage, did not provide probable cause for the subsequent government search and that, in any event, neither the government search nor the seizure could lawfully be made in the absence of a search warrant.

In our opinion the description airline employees gave the F.B.I. concerning the contents of the suitcases provided probable cause to believe that the luggage contained seizable material. There is dictum in our in banc decision in *Corngold v. United States*, 367 F.2d 1, 6 (9th Cir. 1966), to the effect that, after government agents are advised by carrier employees, as a result of a private search, that luggage or packages tendered for shipment contain contraband, the proper course is for the agents to obtain a search warrant before conducting their own search. But in four more recent panel decisions by this court it has been held that, under these circumstances, the government agents need not obtain a search warrant before

conducting their own search.[3]

We need not resolve this question, however, since at the time Agent Fanning went to the airport in response to the information the F.B.I. had received, exigent circumstances existed which entitled him to act without delay. There was reason to believe that unless the agent acted at once, airline personnel might deliver the suitcases to the person holding the check stubs, or forward the suitcases to the airline's headquarters in Chicago.

The circumstances confronting Agent Fanning were thus similar to those which were present in *Clayton v. United States*, 413 F.2d 297 (9th Cir. 1969). We there upheld a warrantless seizure of an air express shipment at the airport when it was tendered for shipment, holding that the exigencies of time and the possible removal of the contraband to another state created an emergency. See also, *Gilbert v. United States*, 366 F.2d 923, 933 (9th Cir. 1966).

It is true that Agent Fanning did not in fact seize the luggage on the day he first inspected its contents, but on the following day. However, the circumstances existing on this second day were exactly the same as on the preceding day—airline personnel were free to release the suitcases to the holder of the stubs, or send them on to Chicago. Failure of the agent to obtain a warrant when, as a matter of hindsight we know he had time to do so, does not change the realities of the situation facing the agent at the time of the seizure, nor create a duty where none otherwise existed.

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[3] See *United States v. Harless*, 464 F.2d 953 (9th Cir. 1972); *Clayton v. United States*, 413 F.2d 297, 447 F.2d 476 (9th Cir. 1971); *Wolf Low v. United States*, 391 F.2d 161 (9th Cir. 1968); *Gold v. United States*, 378 F.2d 588 (9th Cir. 1967).

The luggage was seizable in the eyes of the law, without warrant, at any time the government agent chose to seize it. His willingness yesterday to risk loss does not compel him to take the same risk today.

The order is affirmed.

†

APPENDIX C

ORDER DENYING PETITION FOR REHEARING

In the United States Court of Appeals, for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROY D. GARNER, Defendant-Appellant.

NO. 72-1823 (D.C. 5356)

[Filed August 31, 1973]

Before: HAMLEY and MERRILL, Circuit Judges, and SCHNACKE, District Judge*

The panel as constituted in the above case has voted to deny the petition for a panel rehearing.

The full court has been advised of the suggestion for an in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed.R.App.P. 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Dated: August 31, 1973

FREDERICK G. HAMLEY
United States Circuit Judge

*The Honorable Robert H. Schnacke, United States District Judge for the Northern District of California, sitting by designation.

CONSTITUTIONAL PROVISIONS

AMENDMENT IV–SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V–CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

†

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My address is 326½ Main Street, Huntington Beach, California 92648, that on OCTOBER 29, 1973, I served the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (United States v. Roy D. Garner) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

3 COPIES
SOLICITOR GENERAL OF THE UNITED STATES
U. S. Department of Justice
Washington, D. C. 20530

2 COPIES
UNITED STATES ATTORNEY
CENTRAL DISTRICT OF CALIFORNIA
1200 United States Court House
312 North Spring Street
Los Angeles, California 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on OCTOBER 29, 1973, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer, 326½ Main Street, Huntington Beach, Ca. 92648
(714) 536-7161

LIBRARY
SUPREME COURT, U S

No 73-716

FILED
MAR 20 1974
MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

ROY D. GARNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-716

ROY D. GARNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that evidence obtained by a private search of unclaimed luggage by an airline employee and later disclosed to a federal agent, who examined the luggage and removed it from the custody of the airline on the following day, could not be introduced at his bail revocation hearing.

Following his conviction in August 1970 in the United States District Court for the Central District of California for conspiracy to violate federal gambling statutes, petitioner was released on bond pending appeal. Thereafter the government filed with the sentencing court a motion to revoke the appeal bond and to remand petitioner to the custody of the Attorney General. The basis for the motion was that on December 16, 1971, petitioner had checked certain baggage with an airline in

New York City which had been found to contain, *inter alia*, paraphernalia and drugs used to stimulate and depress race horses. Petitioner moved to suppress the items found in New York City on the ground that they were the product of an unlawful search and seizure. Following a hearing, the district judge denied the motion to suppress and, on March 15, 1972, entered an order revoking petitioner's bond. The order was stayed pending appeal.

On April 5, 1972, petitioner filed a motion with the district court to vacate the revocation of his appeal bond. The district court denied relief, and the court of appeals affirmed on July 6, 1973 (Pet. App. B).[1] Meanwhile, on June 5, 1972, the court of appeals reversed petitioner's conspiracy conviction. Thereafter, rehearing *en banc* was granted. Argument was heard on March 13, 1973; however, no decision has as yet been reached.

Because petitioner's underlying conviction was reversed by a panel of the court of appeals, the United States did not seek petitioner's incarceration following the affirmance of his bail revocation. Nor will the United States move for petitioner's confinement on the gambling conspiracy conviction unless and until the court of appeals, *en banc*, affirms that conviction. In these circumstances all questions concerning the government's efforts to revoke petitioner's bail pending appeal, which are the only matters raised by this petition, are moot. If the court of appeals reverses his conviction, there

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[1]The judgment of the court of appeals was entered on July 6, 1973. A petition for rehearing was denied on August 31, 1973. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to October 30, 1973. The petition was filed on October 31 and is therefore out of time under Rule 22(2) of the Rules of this Court.

will, of course, be no immediate cause for his confinement. If the court of appeals affirms, there would no longer be any occasion to consider the question of bail pending appeal. The question of bail pending a possible petition for a writ of certiorari would be a new question, to be considered and determined at such time as it might arise, and the denial of the instant petition would in no way prejudice petitioner's right to review a later adverse determination on the question of bail—including renewal of his challenge to the evidence in question here, if that is relied upon as a ground for denial of bail at that time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

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[2]We believe there is no merit to his contentions either that the search of his abandoned luggage was illegal or that, even if it was, that dictates exclusion of the evidence from a proceeding such as a bail revocation hearing. Cf. *United States* v. *Calandra*, No. 72-734, decided January 8, 1974.

DOJ-1974-03

73-716

FILED
MAY 9 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-16

ROY D. GARNER,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

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(213) 655-5011

Attorney for Petitioner

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648 - (714) 536-7161

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-16

ROY D. GARNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

This is a Petition for Rehearing of the Order of this Court dated April 15, 1974, denying the Petition for Certiorari.

REASONS FOR GRANTING REHEARING

The Memorandum of the United States in Opposition to the Petition for Certiorari (which was filed after notice from the Clerk of this Court that no response had been filed) sets out as a plea in abatement that Petitioner's underlying conspiracy conviction had been reversed by a Panel of the Ninth Circuit Court of Appeals, *En Banc*, and that rehearing had been granted and was still pending before the Ninth Circuit Court of Appeals.

On April 11, 1974, the Court of Appeals, in a seven to five decision, *affirmed* the Judgment of Conviction of the Petitioner herein (*Roy D. Garner v. United States of America*, CA9 number 71-1219).

A Petition for Rehearing/Reconsideration has been timely filed with the Court of Appeals. If that Petition is not granted, a Petition for Writ of Certiorari will be filed with this Court to review the very important and novel question heard and decided by the Ninth Circuit *En Banc*.

CONCLUSION

If this Honorable Court denied Certiorari on the basis recommended by the Solicitor General, to wit: that the case in controversy is not ripe for decision, then, it is submitted that the change in the decision of the Court of Appeals for the Ninth Circuit from reversal of the Defendant's conviction to an affirmance of his conviction places the Petitioner in serious jeopardy of being placed in jail upon a revocation of bail based upon the use of evidence and property unlawfully seized from the Defendant. The questions posed in the

original Petition for Certiorari are therefore ripe for decision by this Court.

Incidentally, no criminal charges have ever been filed against the Defendant, ROY D. GARNER, arising out of the seizure of materials in New York. Notwithstanding this fact, the Government has refused to return the private property of this Petitioner to him.

For the reasons aforestated, the Petition for Writ of Certiorari should be granted by this Court.

DATED: May 7, 1974.

Respectfully submitted,

BURTON MARKS

Attorney for Petitioner

CERTIFICATE OF COUNSEL

The undersigned counsel does hereby certify that this Petition for Rehearing is brought in good faith and not for the purpose of delay, and is a result of intervening circumstances which are set forth in the body of the Petition.

Petition is a member of the Bar of this Court

DATED: May 7, 1974.

BURTON MARKS

Attorney for Petitioner

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is

8383 Wilshire Boulevard, Suite 510, Beverly Hills, California.

On May 7, 1974, I served the within PETITION FOR REHEARING on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Beverly Hills, California, addressed as follows:

3 COPIES
SOLICITOR GENERAL OF THE UNITED STATES
U. S. Department of Justice
Washington, D. C. 20530

2 COPIES
UNITED STATES ATTORNEY
CENTRAL DISTRICT OF CALIFORNIA
1200 United States Courthouse
312 N. Spring Street
Los Angeles, California 90012.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on May 7, 1974, at Beverly Hills, California.

ELLEN BERLIN

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, and I am a printer engaged in printing and filing appellate briefs for attorneys in the Orange County and Los Angeles areas.

On MAY 16 1974, I prepared copies of a Petition for Rehearing in the matter of Roy D. Garner vs. United States of America, Supreme Court Case No. 73-16, and am herewith forwarding 41 COPIES of said document to the UNITED STATES SUPREME COURT. It is my understanding that the original signed copy of this document is now on file with the Supreme Court and that copies thereof were forwarded as indicated on the Proof of Service by Mail as signed by Ellen Berlin and reproduced herein.

D. A. Standefer